Supreme Court, U.S.
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No. 05-347

IN THE

Supreme Court of the United States

CHARLENE JENKINS,
Petitioner,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, INC. AND FIRST NATIONAL BANK IN BROOKINGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioner, Charlene Jenkins, is an individual and resident of the State of Georgia. As only the question of arbitrability was decided at the trial court level, Petitioner has no established knowledge as to Respondents' corporate inter-relationships. Based upon the disclosures made in the trial court, Petitioner can provide the following disclosures:

First American Cash Advance of GA

Sole Member and Chief Manager: First American Holding, LLC

Affiliates:
- First American Cash Advance of OK, LLC
- First American Cash Advance of AR, LLC
- First American Cash Advance of CO, LLC
- First American Cash Advance of FL, LLC
- First American Cash Advance of KY, LLC
- First American Cash Advance of SC, LLC
- First American Investments of GA, LLC
- First American Cash Advance of TN, LLC f/k/a Kugler, LLC
- United Services, Inc.
- Foresight Management Co, LLC
- Union Management Co., LLC
- FACA of KY, LLC
- FACA of AR, LLC
- First American Franchising, LLC
- First American Financial Services, LLC

First National Bank in Brookings

owned by: Fishback Financial Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	3
JURISDICTION	4
PERTINENT STATUTORY PROVISIONS	4
FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED	5
STATEMENT OF THE ISSUES ASSERTED TO MERIT THE GRANT OF CERTIORARI	6
I. BACKGROUND TO GEORGIA'S STRONG PUBLIC POLICY AGAINST PAYDAY LENDING ACTIVITIES	8
II. *JENKINS II* CONFLICTS WITH AND MISAPPLIES CONTROLLING PRECEDENT	10
A. The Panel Misapplied *Prima Paint*	11
B. The Panel Failed To Correctly Apply the FAA and *Doctor's Associates, Inc. v. Casarotto*	13
C. The Arbitration Clause Is "At Issue."	14
D. The Panel Failed To Apply Georgia Law	15
III. ARBITRATORS CANNOT DECIDE SUBSTANTIVE GATEWAY LEGAL ISSUES	16
CONCLUSION	17

TABLE OF CONTENTS—Continued

Page

Appendix A—Opinion, Eleventh Circuit Court of Appeals (Feb. 18, 2005) ("*Jenkins II*") 1a

Appendix B—Opinion, United States District Court, Southern District of Georgia (Nov. 23, 2005) ("*Jenkins I*") 25a

TABLE OF AUTHORITIES

U.S. Supreme Court Cases Page

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) ..... *passim*
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 3
Howsam v. Dan Witter Reynolds, Inc., 537 U.S. 79 (2002) 10, 11
Prima Paint Corporation v. Flood & Conklin Mfg., Co., 388 U.S. 395 (1967) ..... *passim*

Eleventh Circuit Cases

Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002) ..... *passim*
Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986) 11, 14
Chastain v. Robinson-Humphrey Company, Inc., 957 F.2d 851 (11th Cir. 1992) 12, 14
Jenkins v. First American Cash Advance of Georgia, LLC, 400 F.3d 868 (11th Cir. Feb. 18, 2005)("*Jenkins II*") ..... *passim*

District Court Cases

Jenkins v. First American Cash Advance of Georgia, LLC, 313 F. Supp. 1370 (S.D. Ga. 2003)("*Jenkins I*") ..... *passim*

Georgia State Law Cases

Barger v. Gardenway, Inc., 499 S.E.2d 737 (Ga. App. 1998) 16
Department of Transp. v. Brooks, 328 S.E.2d 705 (Ga. 1985) 8
Freeman v. Decatur Loan & Finance Corp., 231 S.E.2d 409 (Ga. App. 1976) 8
Gress v. Knight, 68 S.E. 834 (Ga. 1910) 11

TABLE OF AUTHORITIES—Continued

	Page
Hanley v. Savannah Bank, 68 S.E.2d 581 (Ga. 1952)	14, 15
H.G. Brown Family LTD v. City of Villa Rica, 607 S.E.2d 883 (Ga. 2005)	15
Minor v. McDaniel, 435 S.E.2d 508 (Ga. App. 1993)	16
R.R.R. Ltd. Partnership v. Recreational Services, Inc., 448 S.E.2d 211 (Ga. 1994)	15
Pope v. Marshal, 78 Ga. 635 (1887)	8
USA Payday Cash Advance Centers v. Oxendine, 585 S.E.2d 924 (Ga. App. 2003)	8
Federal Laws	
9 U.S.C. §§ 2 & 4	*passim*
State Statutes	
O.C.G.A. § 13-3-45	16
O.C.G.A. § 16-17-1	9, 10
O.C.G.A. § 16-7-8	10
Other State Cases	
Cardegna v. Buckeye Check Cashing, Inc., 894 So.2d 860 (Fla. 2005)	*passim*

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INTRODUCTION

Petitioner suggests respectfully that the sanctity of arbitration is not at issue in this case. Rather, the question is whether section 2 of the FAA immunizes and shelters the payday lending industry's $40 Billion in annual cash advancement practices[1] by prohibiting the judiciary from applying state law principles of contract construction in order to make substantive gateway determinations about the question

[1] *See* Brief of Amicus Curiae Community Financial Services Association of America in Support of Petitioner, p. 2, filed before this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264.

of arbitrability solely because the underlying agreement also houses an arbitration clause.

But regardless of Petitioner's view that the arbitration clauses are being improperly used to accomplish the sinister and single-purpose of perpetuating criminal activity, this Court is called upon to resolve and harmonize the emerging conflict between state law decisions that apply state law contract principles to invalidate payday lending contracts (and the arbitration clauses they contain) and federal decisions, like the Eleventh Circuit in the underlying case, that refuse to allow state law principles of contract construction to be considered when deciding gateway legal issues about the enforceability of an arbitration clause. At the outset, it should not go unnoticed that this peculiar conflict arises almost entirely in the context of litigation involving the efforts of payday lenders—many of which prey upon our military personnel, the elderly and disadvantaged consumers—to infuse arbitration clauses into uniform loan agreements that are repeatedly and regularly declared by state legislative bodies and other state law enforcement agencies to be usurious loan transactions which, as a matter of state law, are illegal, unenforceable and treated as though they never existed at all.

In refusing to allow federal trial courts to consider and apply state law contract principles that would clearly invalidate the underlying payday lending contracts, the Eleventh Circuit has, first in *Bess v. Check Express, Inc.* and again in *Jenkins v. First American Cash Advance of Georgia, Inc.*, rendered meaningless the express declarations of Congress in 9 U.S.C. § 2 that arbitration clauses are valid, "***[except] upon such grounds as exist at law or in equity for the revocation of any contract.***" By preventing federal trial courts from making substantive gateway determinations, the Eleventh Circuit is promoting the contrary and wrong view that arbitra-

tion clauses can be elevated above the payday loan agreements in which they are housed.

This Court has recently granted Certiorari to review the Florida Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (*cert. granted* June 20, 2005). As *Cardegna* represents the prevailing state law view on what section 2 of the FAA and this Court's interpretation of it means, the Eleventh Circuit's panel decision of *Jenkins v. First American Cash Advance of Georgia, Inc.*, represents a conflicting federal view and demonstrates how dramatically different the result can be when a trial court is prohibited from considering state law contract principles to decide if the arbitration clause is enforceable. As Justice Breyer noted in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration."

Petitioner respectfully suggests Certiorari is therefore appropriate on the basis of bringing the full conflict before the Court and also because the outcome in *Cardegna* will necessarily impact the conflicting federal view and the precedent set forth in *Jenkins*—the time in which to appeal is now in hand. However, should the Court determine that *Jenkins* adds nothing new to the debate already before it, the Court should grant the requested Petition for a Writ of Certiorari and hold the case until the propriety of *Cardegna* is determined and the conflict resolved.

OPINIONS BELOW

The District Court below rightly denied arbitration of Charlene Jenkins' dispute with her payday lender. Applying state rules of contract construction as required and permitted by section 2 of the FAA, the court held that the making of the arbitration agreement was at issue and under Georgia law both the loan agreement and the arbitration clause it housed

were unconscionable as a matter of state law and could not be enforced. *Jenkins v. First American Cash Advance of Georgia, LLC*, 313 F. Supp. 1370 (S.D. Ga. 2003) ("*Jenkins I*"). On appeal the reviewing panel of the Eleventh Circuit reversed, concluding the trial court had no right to determine the validity of the agreement to arbitrate since Jenkins' challenge to both the loan agreement and the arbitration clause housed therein were questions for the arbitrator—not the court—to decide. *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. Feb. 18, 2005)("*Jenkins II*"), *reh'g denied* April 29, 2005. By order dated May 18, 2005, issuance of the mandate in *Jenkins* was stayed pending acceptance of Certiorari and final resolution by this Court.

JURISDICTION

The panel decision rendered by the United States Circuit Court of Appeals for the Eleventh Circuit conflicts with precedent from this Court, other decisions in the Eleventh Circuit and decisions by state courts of last resort. Jurisdiction is therefore appropriate pursuant to Rule 10(a) of the Court's Rules.

The decision sought to be reviewed here was rendered on February 18, 2005, and a petition for Rehearing En Banc was denied on April 29, 2005. By Justice Kennedy, the time to file this petition was extended until September 12, 2005. The petition is therefore timely submitted.

PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Acts provides in pertinent part:

> . . . an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***.

(Emphasis added.) Section 4 of the Federal Arbitration Act provides in pertinent part:

> . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Between the four-month span of June 2002 and September 2002, Charlene Jenkins entered into at least eight payday lending transactions with First American Cash Advance of Georgia, LLC ("First American") and First National Bank in Brookings ("FNB")[2]. Each of the loans was for less than $500 and had a maturity date between 7 and 14 days. The annual percentage rates charged for these loans ranged from a low of 438% to a high of 938%. Most of the loans in question charged an interest rate of about 469%. Each time Jenkins entered into a payday lending transaction, as a condition to receiving the money, she was required to sign a promissory note that included an arbitration agreement.

In the trial court, Jenkins asserted the payday loan agreements were illegal and that both the promissory note for the loan and the arbitration clause it contained were unconscionable and could not be enforced. Among the many factors permitted by state law, the District Court concluded that "[t]he type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disad-

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[2] Jenkins claimed that only First American, and not FNB, was the true lender.

vantage." *Jenkins I*, 1370 F.Supp.2d at 1374. The same state law factors the district court considered in finding the loan agreement unconscionable and unenforceable also apply to the arbitration clause. Charlene Jenkins' relative bargaining position, acumen and intelligence did not change simply because she turned the page and placed her signature on a second page, purportedly agreeing to arbitrate. Notably, there is no severability clause contained in either the promissory note or the arbitration clause, and there was no separate consideration paid for the agreement to arbitrate.

STATEMENT OF THE ISSUES ASSERTED TO MERIT THE GRANT OF CERTIORARI

The basic practices engaged by the payday lending industry are already before this Court on a writ of certiorari to review the holding of *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (*cert. granted* June 20, 2005), which represents the prevailing state law view that section 2 of the FAA permits and requires trial courts to apply state law contract principles when determining whether there is a valid agreement to arbitrate. As the briefing in *Cardegna* reflects, many other courts, including the District Court here involved, subscribe to this view and correctly hold that arbitration clauses are not "a class of 'super' clauses, immune from a state's otherwise generally applicable contract law." *Cardegna*, 894 So.2d 860, 866 (Bell, J., specially concurring). The panel decision in the underlying case, however, represents the Eleventh Circuit's opposite and conflicting view that an arbitration clause is not susceptible to challenge despite that the underlying loan agreement is illegal and unenforceable as a matter of state law contract principles. The *Cardegna* view is more accurate because it better reflects Congressional intent of section 2 of the FAA by placing the arbitration clauses on the same footing as the illegal loan agreements in which they are contained and therefore does not confer "super status" upon arbitration agreements.